

Top Takeover Defense Changes of 2018

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Deal Point Data continuously tracks changes to corporate charters and bylaws for key governance and takeover defense changes. It was an active year for corporate change as nearly one-third of S&P 500 companies made a bylaw change during 2018. In this note, we will highlight a few observations of Deal Point Data's takeover defense change and disclosure data for S&P 1500 companies in 2018.

2018 S&P 1500 Charter and Bylaw Filing Activity

Corporate governance best practices and progressive shareholder rights continue to trickle down the market cap ladder: Certain governance practices that have been widely implemented by large cap companies (i.e., S&P 500 companies) including declassifying boards in favor of annually elected	2018 S&P 1500 Charter and Bylaw Filing Activity		Stockholder	%
	Filings	Companies	Approved	Approved
All Charter Filings	407	235	N/A	N/A
Change	197	180	138	70%
Initial (e.g. IPO/Spinoff)	10	10	N/A	N/A
Restated Only	50	47	N/A	N/A
Refiling	150	63	N/A	N/A
All Bylaw Filings	531	392	N/A	N/A
Change	443	370	28	6%
Initial (e.g. IPO/Spinoff)	10	10	N/A	N/A
Restated Only	36	33	N/A	N/A
Refiling	42	32	N/A	N/A

Based on filing date. Companies in index on December 31, 2018.

directors and replacing plurality vote standards to elect directors with a majority standard, continue to be among the top defense changes of small and mid-cap companies (i.e., S&P 600 and 400). Implementing proxy access was also among the top changes for small and mid-cap companies, however, the number of adoptions was relatively low when considering the number of companies that could have potentially adopted it (only 7% of S&P 600 and 22% of S&P 400 allow proxy access nominations). Adding proxy access was the top defense change for large cap companies, but the number of adoptions declined from 79 in 2017 to 41 companies in 2018. This is largely because so many large caps have already moved on this issue (i.e., 71% of S&P 500 have adopted proxy access).

For large cap companies the action is in the bylaws: The top four defense changes by large caps are all provisions almost always found in a company's bylaws, not the charter. Moreover, as large cap companies have dismantled traditional structural defenses and increased shareholder rights, the need for procedural safeguards, especially around shareholders calling special meetings, acting by written consent, and advance notice provisions, has also risen. These procedures are typically detailed in a company's bylaws. The numbers bear out the closer attention being paid to bylaw language by large companies. In 2018, nearly a third of S&P 500 companies made at least one bylaw change during the year versus only 19% of S&P 600 and 22% of S&P 400 companies.

With the increased attention to bylaws and the fact that most companies allow the board to amend the bylaws, shareholders will be called upon less frequently to vote on defense related matters (plus the fact that many of the types of changes requiring shareholder approval have already been made e.g., declassifying boards, eliminating supermajorities). While comparing procedural safeguards to traditional structural defenses is not an apples-to-apples exercise and in some cases may be viewed favorably by shareholders and proxy advisory firms (e.g., requirement that written consents must be solicited from all shareholders and a minimum stock ownership to initiate) these types of changes done unilaterally by the board may now be on the radar of governance activists. In September, shareholder proposals requiring "that each bylaw amendment that is adopted by the Board of Directors shall not become effective until approved by shareholders" were voted on at the annual meetings of FedEx Corporation and H&R Block, Inc. The proposals were submitted by John Chevedden and Kenneth Steiner, both among the most prolific sponsors of governance proposals. The proposals received very little shareholder support (7.4% and 2.5% of votes cast at FedEx Corporation and H&R Block, Inc. respectively). It remains to be seen if this is an issue that governance activists will continue to push in the 2019 proxy season and if so whether these proposals can gain any traction among institutional investors.

Companies of all sizes are concerned with stockholder lawsuits: The adoption of "exclusive forum provisions" was a top governance change among all three groups of companies. These provisions designate a specific court as the exclusive forum for all intra-corporate disputes. An exclusive forum provision can help avoid subjecting a company to multiple lawsuits in multiple jurisdictions on the same matter and discourage forum shopping by plaintiffs. When adopted, exclusive forum provisions are usually included in a company's bylaws but some companies have included it in their charter.

2018 Top Takeover Defense Changes - S&P 500

Defense	Total	Stockholder Approved	% Approved
Add Proxy Access	41	3	7%
Add/Modify Advance Notice Disclosure/Eligibility Requirements	29	0	0%
Add/Modify Advance Notice Timing	14	0	0%
Add Exclusive Forum Provision	13	1	8%
Decrease % Requirement to Call Special Meetings	12	5	42%
Eliminate Supermajority: Bylaws Amendments	11	9	82%
Add Shareholder Ability to Amend the Bylaws	10	4	40%
Add Shareholder Ability to Call Special Meetings	9	3	33%
Eliminate Supermajority: Charter Amendments	7	7	100%
Eliminate Supermajority: Director Removal	6	6	100%
	152	38	25%

2018 Top Takeover Defense Changes - S&P 400

Defense	Total	Stockholder Approved	% Approved
Add Exclusive Forum Provision	11	1	9%
Add Proxy Access	11	1	9%
Add Shareholder Ability to Amend the Bylaws	10	5	50%
Eliminate Classified Board	10	10	100%
Add/Modify Advance Notice Disclosure/Eligibility Requirements	9	0	0%
Add/Modify Advance Notice Timing	8	0	0%
Adopt Majority Standard in Director Elections	8	4	50%
Eliminate Cause Requirement to Remove Directors	7	7	100%
Eliminate Supermajority: Charter Amendments	7	7	100%
Add Shareholder Ability to Call Special Meetings	5	2	40%
Eliminate Supermajority: Director Removal	5	4	80%
	91	41	45%

2018 Top Takeover Defense Changes - S&P 600

Defense	Total	Stockholder Approved	% Approved
Adopt Majority Standard in Director Elections	21	4	19%
Add Exclusive Forum Provision	19	1	5%
Add/Modify Advance Notice Timing	14	0	0%
Add/Modify Advance Notice Disclosure/Eligibility Requirements	12	0	0%
Eliminate Classified Board	12	12	100%
Add Proxy Access	10	1	10%
Add Shareholder Ability to Amend the Bylaws	10	4	40%
Eliminate Cause Requirement to Remove Directors	9	9	100%
Add Shareholder Ability to Call Special Meetings	5	3	60%
Eliminate Supermajority: Bylaws Amendments	5	4	80%
Eliminate Supermajority: Charter Amendments	5	5	100%
	122	43	35%

Based on effective date of defense change. Companies in index on December 31, 2018.

About Deal Point Data

Deal Point Data is transforming the way M&A, securities and corporate governance research is done.

Deal Point Data streamlines the process of identifying precedents and analyzing market trends.

Our data-driven applications enable the world's leading law firms and investment banks to save countless hours of manual research while getting answers faster than ever.